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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-923

ALAN L. STEIN, AS SECRETARY OF THE BUSINESS AND TRANSPORTATION AGENCY OF THE STATE OF CALIFORNIA,

*Appellant,*

v.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, etc., and FEDERAL HOME LOAN BANK BOARD,

*Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND STATEMENT OF INTEREST OF AMICUS

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The N.A.A.C.P. Legal Defense and Educational Fund, Inc. moves this Court, pursuant to Rule 42(3) of the Rules of the Supreme Court for the United States, for leave to file brief amicus

curiae.[1/] The reasons for so moving also disclose the interest of the amicus. While the Legal Defense Fund recognizes that this Court does not look with favor upon filing amicus curiae briefs in support of jurisdictional statements, two extremely important issues in this case were not emphasized in any of the briefs below. The brief accompanying this motion is limited to summary discussion of those two points.

The issue presented by the instant appeal, whether regulations against redlining promulgated by the Federal Home Loan Bank Board pre-empt the application of California's Housing Financial Discrimination Act of 1977 to federal savings and loan associations in California, is one of general importance and vital concern to amicus, a non-profit corporation that seeks to eliminate racial discrimination through legal means. The California statute here at issue, Cal. Health & Safety Code §35800 et. seq. (West Supp. 1979), is an important one which expressly addresses the perpetuation of racially segregated neighborhoods by redlining, §35801(e)(7), and prohibits discrimination in lending on the basis of race, §35811, or racial composition of neighborhood, §35812.

1/ The Federal Home Loan Bank Board consented to the filing of the brief. The Conference of Federal Savings and Loan Associations declined to give its consent.



The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established under the laws of the State of New York. It was founded to assist black persons to secure their constitutional and statutory rights by the prosecution of lawsuits.

A primary aim of the Legal Defense Fund is to secure the right of black citizens to live in stable, integrated neighborhoods. Redlining inhibits the freedom to live where one wants, for the absence of mortgage money makes impossible the purchase of homes in such areas. Moreover, redlining causes stable areas to deteriorate, through lack of investment. It is therefore of the utmost importance that prohibitions against redlining, including California's anti-redlining legislation, be effective.

Amicus has a more specific interest which grows out of a 1976 case in the United States District Court for the District of Columbia, National Urban League, et al. v. Office of the Currency, (No. 76-718), in which amicus, as one of plaintiffs' counsel, negotiated a Settlement Agreement with the Federal Home Bank Board by which it agreed to promulgate new regulations

against redlining in compliance with its obligations under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. Those regulations contain the federal prohibition against redlining and the enforcement machinery on which turn the claims in the instant case. Amicus submits that those regulations should not pre-empt or interfere with state prohibitions against redlining by federal savings and loan associations and that the National Urban League Settlement Agreement should not be used as a weapon to frustrate the goal of eliminating redlining through complementary state and federal enforcement.

The opinion of the United States Court of Appeals for the Ninth Circuit affects the legal rights of black persons as well as the enforcement by state and local governments of rights which the United States holds important and which by federal statute have been placed under joint federal-state protection.



Wherefore, movant prays that the attached brief amicus curiae be permitted to be filed with the Court.

Respectfully submitted,

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# BRIEF AMICUS CURIAE

## ARGUMENT

1. The Anti-Redlining Regulations of the Federal Home Loan Bank Board are Grounded in Federal Civil Rights Statutes; the Decision Below, in Holding Otherwise, Endangers Continued Federal-State Co-operation in Enforcing Anti-Discrimination Legislation.

In holding that the Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461-1470, ("HOLA") pre-empted the entire field of regulatory control over federal savings and loan associations, the Ninth Circuit ignored specific anti-pre-emption provisions of federal anti-discrimination statutes.

Amicus suggests that, in so doing, the court below misconceived the nature of the Federal Home Loan Bank Board's statutory authority for the promulgation of anti-redlining regulations.

HOLA is a comprehensive statutory scheme that was enacted to alleviate, through creation of a federal savings and loan system, severe economic hardships faced by mortgage debtors during the Great Depression. The statute does not in any way address racial discrimination in lending. Fundamental to the holding that the grant of regulatory authority given to the Federal Home Loan Bank Board ("Board") by HOLA pre-empts the applicability of California's anti-redlining legislation to federal savings and loans is the notion that the Board's authority to issue anti-redlining regulations is based upon HOLA, rather than upon the specific anti-discrimination provisions of Title VIII and the Equal Credit Opportunity Act (ECOA). But both Title VIII and ECOA apply to the Board and contain specific provisions against the pre-emption of state anti-redlining legislation. 42 U.S.C.§3615; 15 U.S.C. §1691d(e). The holding of the Ninth Circuit directly frustrates Congress' express intention to supplement federal anti-discrimination efforts with state efforts.



The Board itself issued its regulations pursuant to those civil rights statutes. The Board's first prohibition in 1972 against discrimination in lending was adopted "implementing Title VIII of the Civil Rights Act of 1968 (the Federal Fair Housing Act)." See 42 Fed. Reg. 58954. In announcing in November, 1977 the strengthened regulations now in effect, the Board explained that they were "for monitoring the Equal Credit Opportunity Act (ECOA), Title VIII of the Civil Rights Act of 1968, and other civil rights statutes which the Board enforces." 42 Fed. Reg. 58182. Finally, in its announcement promulgating these regulations, the Board explained that it adopted them "to update and strengthen its nondiscrimination-in-lending regulations and policy statement which reflect provisions of the Federal Fair Housing Act, the Equal Credit Opportunity Act (ECOA), and the Community Reinvestment Act (CRA)." 43 Fed. Reg. 22332.

Even to the extent that the Board's redlining regulations derived in part from HOLA, Congressional intent concerning civil rights cannot be rejected. As with any other issue of statutory construction and legislative intent, the more narrowly drawn provisions of the civil

rights statutes, upon which the regulations are based explicitly, control to the extent that they conflict with more general provisions of HOLA. Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961). Moreover, even if the statutes were of equal specificity, the more recent provisions of Title VIII and ECOA should be construed as a continuation of HOLA in so far as they speak, not inconsistently, to the same issues as HOLA. Posadas v. National City Bank, 296 U.S. 497, 503 (1936). As HOLA does not specifically address discrimination in lending, it is not inconsistent with Title VIII and ECOA provisions on the subject, and therefore HOLA should not, as a matter of statutory construction, supersede the latter two.

There are, in addition, strong policy reasons for not allowing HOLA to pre-empt the state regulations. The overall statutory mechanism for combatting redlining by federal savings and loan associations would suffer if the California provisions, based upon intimate knowledge of local conditions, were inapplicable. Furthermore, a precedent dangerous to the enforcement of all state anti-discrimination legislation would be allowed to stand if HOLA, a statute that does not



address discrimination, were allowed to supersede the specific provisions against pre-emption in applicable federal civil rights legislation. Joint federal-state enforcement is common to a wide range of civil rights legislation. Such a result would be counter to this Court's reluctance to infer pre-emption, Exxon v. Governor of Maryland, 437 U.S. 117, 132 (1978) and Congress' repeated desire to enlist state and federal power against discrimination. See, e.g., 42 U.S.C. §3616; 15 U.S.C. §1691d(f).

## II. The Decision of the Court of Appeals Below Effectively Denies to Blacks the Substantive Protections of California's Anti-Redlining Statute Without Considering or Ruling on the Issue of Whether Such Rights are Pre-empted.

The Court of Appeals distinguished between the substantive provisions of the California Housing Financial Discrimination Act of 1977 ("the Act"), "those conferring substantive rights upon borrowers to be free from discriminatory practices in the lending of money or extending of credit," and the Act's procedural provisions, "those providing for regulatory control over the lending institutions to insure that the substantive rights of borrowers are respected."

Since the Complaint sought only a declaration that the Act was pre-empted by HOLA and an injunction against California's enforcement of the Act, the Ninth Circuit solely held that the procedural provisions of the Act were pre-empted. It did not formally consider the issue of pre-emption of the substantive provisions. Neither did the Court rule on whether, in light of the holding that the state was pre-empted from enforcement of its statute, the federal regulatory agency was obligated to enforce the substantive provisions of the state statute as to federal savings and loan associations in California. Amicus contends that the Court of Appeals' attempt to bifurcate the issue of pre-emption is illusory and ignores the realities of California's statutory scheme. As a practical matter, the opinion below reaches beyond procedure and regulation. It denies black individuals the substantive protection against redlining to which they are statutorily entitled by California law without having had the issue of the pre-emption of such rights properly litigated.

According to California's Housing Financial Discrimination Act of 1977, borrowers alleging discriminatory treatment can only obtain judicial review after filing a complaint with the



Secretary of California's Business and Transportation Agency, and after a formal administrative hearing concerning the Secretary's handling of the complaint. Cal. Health & Safety Code §§35820-35823. The Act does not authorize direct judicial review of alleged violations of substantive rights, but rather makes enforcement of such rights dependent upon the borrower's awareness that judicial review must be preceded by both an administrative complaint and an administrative hearing.

Failure to know that one must exhaust administrative remedies effectively precludes a consumer from vindicating his or her right to be free from discrimination in lending. The California Act compels financial institutions to give potential borrowers notice not only of the kinds of discriminatory practices prohibited, but also of the mechanism for securing review of any alleged discrimination. Cal. Health & Safety Code §35830. It is this notice provision that prompted the filing of this action and which the Ninth Circuit held was pre-empted. Absent such notice, most potential borrowers will not, in all probability, ever become aware of their substantive rights. Even if an occasional minority

borrower should accidently learn of the statute, the protection which it was intended to afford is rendered meaningless, because California is precluded from investigating a civil rights violation by federally chartered savings and loan associations, either on the Secretary's own initiative or as a result of the filing by a consumer of a specific complaint.

Without having considered the pre-emption issue as applied to the Act's substantive provisions, therefore, the decision below effectively nullifies any substantive rights under the Act. In view of the practical interrelationship between the procedural and substantive provisions of the Act, amicus suggests that the pre-emption issue before this Court cannot be resolved without full consideration of Congressional intent concerning the substantive rights of racial minorities to be free from discrimination in lending. Congress has declared that any state law which gives greater substantive protection to loan applicants than that provided by ECOA or Title VIII shall not be pre-empted. 15 U.S.C. §1691d(f); 42 U.S.C. §3615. The Court of Appeals below failed either to compare the corresponding provisions of the state and federal anti-redlining legislation



or to consider the extent to which the state and federal provisions are in fact inconsistent.

## CONCLUSION

WHEREFORE, Amicus urges the Court to hear oral argument in this case and consider these issues, which are crucial to a determination of whether blacks in California are entitled to the protections of the state prohibition against discrimination in lending.

Respectfully submitted,

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